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IN THE

Supreme Court of the United States

October Term, 1965

No. 364

ROBERT FROEHLICH and
ROBERT FROEHLICH FUNDING COMPANY,

Petitioners,

against

THE DISTRICT JUDGES CONSTITUTING THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK and ROBERT M. MORGANTHAU, as UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK,

Respondents.

PETITIONERS' REPLY

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New York, New York 10004

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One aspect of the Government's brief requires reply.

The Government makes the bare statement that the indictment is valid and supports it solely with the footnote that "Similar indictments in which there is a reference of essential general allegations to tables listing specific counts have been upheld in many cases" (Respondents' Brief, pp. 3-4, footnote 2). The quoted sentence says more than is presented in the case at bar.

A count in an indictment is something more than a line of tabular matter in "tables listing specific counts". Each count is, in effect, a separate indictment. *Cyclopedia of Federal Procedure,* 3rd Edition, Vol. 11, §42.102, p. 420. It must stand or fall on its own allegations without reference to other parts of the document not expressly incorporated by reference, *Walker* v. *United States,* 176 F. 2d 796 [9 Cir. 1949]; *United States* v. *Gordon,* 253 F. 2d 177 [7 Cir. 1958]. This rule is not just a matter of form. *United States* v. *Cuzy,* 313 F. 2d 337, 339 [3 Cir. 1963].

Such incorporation by reference may be accomplished by language either (a) within the count, referring to other parts of the indictment, or (b) in the indictment but *dehors* the count, referring such material to the count. Neither course was followed here.

Each count here is literally only a line of tabular matter in "tables listing specific counts". There is no language within any count incorporating by reference other material in this multi-count indictment.

Conversely, there is no language *dehors* the one-line counts incorporating the core general allegations with the numbered counts. This is easy enough to do in unmistakable fashion. Thus, in *United States* v. *Taylor,* 203 F. 2d 437 (2 Cir. 1953), the general allegation in the indictment was followed by the statement:

> "The aforesaid allegation is hereby realleged for counts one to 225 inclusive."

No such or similar allegation incorporating the general allegations within the individual one-line counts appears in this indictment.

Although District Judge Murphy called the indictment here "terse and cryptic" (Petition for Writ of Certiorari, Appendix C, p. 36)—echoing this Court's reference to "[a] cryptic form of indictment" in *Russell* v. *United States*, 369 U. S. 749, 766—he nevertheless upheld its validity.

We respectfully suggest that the indictment is invalid on its face and, therefore, that the District Court lacks jurisdiction to proceed.

For this and for all the other reasons set forth in the Petition for Writ of Certiorari herein, the writ should be granted.

Dated: New York, N. Y.
August, 1965

Respectfully submitted,

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END